494, 504, of dismissing the complaint as to them at trial, would be productive of little benefit to the court and vexatious to the parties. Of course, if the test of general convenience is to be substituted for the more scientific one requiring real simplification of the issues, enough saving may be found in these cases to outweigh the danger of laxity in pleading. At the same time the English practice of bringing separate suits and having them tried together, *Blair* v. *Deakin* (1887) 57 L. T. N. S. 522, appears preferable.

CRIMINAL INTENT UNDER PENAL STATUTES.—A few exceptions are generally recognized to the proposition that, because of the necessity of criminal intent, a principal is not criminally liable for the acts of his agent, unless the agent acts, not merely within the scope of his employment as in civil cases but upon actual authority, express or implied. Clark & Marshall, Law of Crimes §193. In the first, that of public nuisance, the leading case is *Rex* v. *Dixon* (1814) 3 M. & S. 11. There, however, the jury found that the defendant knew to some extent of the use of the noxious ingredient relied on, and he was therefore held for failure to use proper precaution. The later case of *Rex* v. *Medley* (1834) 6 C. & P. 292, decides squarely that the officers of a gas company were responsible for a nuisance created without their knowledge by their employees. This authority has been accepted to some extent in the United States. *Hunter* v. *State* (Tenn. 1858) 1 Head 160. The only tenable ground for this position is that more recently taken in *Regina* v. *Stephens* (1866) L. R. 1 Q. B. 702, that although the proceedings upon a public nuisance are criminal in form, they are in substance civil, and not for punishment primarily but for abatement in the interest of the many injured. See also Wharton, Crim. Law § 1420.

Under a second exception, the courts hold a principal criminally liable for the unauthorized publication of a libel by his agent. After considerable conflict in the decisions, cf. *Lamb's Case* (1610) 9 Co. 59; *Rex* v. *Dodd* (1724) 11 Sess. 33, it was determined in *Rex* v. *Almon* (1770) 5 Burr 2686, that publication of a libel by an agent was *prima facie* evidence of his principal's privity. Later, on the authority of *Rex* v. *Dodd*, supra, the absolute liability for an unauthorized publication was established. *Rex* v. *Gutch* (1829) M. & M. 433. Though the rule has been generally followed in the United States, Townshend, Slander & Libel § 123, its injustice has been partially remedied by statutes, 6 & 7 Vict. c. 96 § 7; N. Y. Penal Code § 246, which re-establish the doctrine of *Rex* v. *Almon*, supra.

In a case recently decided in Washington it was held that the owner of a saloon was criminally liable for the unauthorized sale of liquor to a youth of seventeen under a statute putting a penalty upon the sale of liquor to minors. *State* v. *Constatine* (1906) 86 Pac. 384. It is often said that penal statutes constitute a third exception to the rule first laid down, Smith, Master & Servant (4th ed.) 273, and *Atcheson* v. *Everett* (1776) Cowp. 382, is cited as the leading case for the proposition. In that case Lord Mansfield said that "this is as much a civil action as an action for money had and received. There is no authority that a penal

action is a criminal action." To the first proposition Lord Mansfield seems to have been led by the fact that a penalty was properly recovered in an action of debt brought on behalf of the government; while to support the second, he cited *Wynne* v. *Middleton* (1746) 1 Wils. 125, which was in fact an action by a party injured by false election returns suing under a statute which gave him double damages and costs, and to which was joined no payment of a fine to the State. Here at the outset we see a confusion of remedial and penal statutes, which seems to have been a considerable source of error. It should be understood that penal statutes are those imposing punishment for an offense committed against the State. The expression does not include statutes which give a private action against the wrongdoer. *Huntington* v. *Attrill* (1892) 146 U. S. 657, 667.

It has been generally held that when the interests of the public imperatively demand that certain acts should be done only at the actor's peril, criminal intent may by statute be eliminated as a necessary element of the crime. *Regina* v. *Woodrow* (1846) 15 M. & W. 404; *Commonwealth* v. *Farren* (1864) 9 Allen 489. But the great disadvantage to the individuals affected, to say nothing of the requirement of intent in the common law, requires that unless such intent is by the statute dispensed with expressly or by necessary implication, proof thereof should be essential to conviction. *Regina* v. *Tolson* (1889) 23 Q. B. D. 168; *Gordon* v. *State* (1875) 52 Ala. 308; *Miller* v. *State* (1854) 3 Oh. St. 475; *Commonwealth* v. *Goslin* (1893) 158 Mass. 482. This has been often overlooked, and an interpretation given to statutes in favor of the State, unwarranted by any expression or necessary implication, simply because without such forced interpretation the statutes do not accomplish all that the courts think they should. *Mogler* v. *State* (1886) 47 Ark. 109; *People* v. *Roby* (1884) 52 Mich. 577; *McCutcheon* v. *People* (1873) 69 Ill. 601. Indeed, some courts, especially in England, influenced perhaps by the opinion of Lord Mansfield above mentioned, appear to go so far as to hold that the question of the legislature's intent to dispense with criminal intent is impertinent, the liability being rather an obligation of civil nature. *Carrol* v. *State* (1885) 63 Md. 551; *Mullins* v. *Collins* (1874) L. R. 1 Q. B. 292. But cf. *Boyle* v. *Smith* (1906) L. R. 1 K. B. 432. There are still other courts which take a middle ground, holding that criminal intent is always necessary, but that the relation of master and servant under certain circumstances (which seem always to occur under penal statutes) constitute *prima facie* evidence of privity. *State* v. *Wentworth* (1875) 65 Me. 234; *Commonwealth* v. *Nichols* (Mass. 1845) 10 Metc. 259; *Fullwood* v. *State* (1890) 67 Miss. 554. Under a more restricted classification, a distinction which has gained wide and apparently permanent acceptance is that made between statutes covering acts *mala in se* and *mala prohibita*, intent being non-essential in the latter class. *Commonwealth* v. *Adams* (1873) 114 Mass. 323. But these various positions, in so far as they depart from the rule that intent is a necessary element, unless expressly or impliedly dispensed with by the legislature, are not to be supported. When the courts proceed upon the theory that intent has been so dispensed with, their interpretations however strained, can scarcely be declared groundless. But it seems impossible to arrive

at a similar conclusion when, as in *State* v. *Constatine*, supra, the question of interpretation seems not to have been seriously considered, and the decision is based upon the ground that intent is not a normal element of the offense.

POPULAR REFERENDUM AS A DELEGATION OF LEGISLATIVE POWER.—The rule forbidding the delegation of legislative power arises from the organization of governmental power under the State constitutions, whereby the people having entrusted their representatives with the prerogative of legislation, the representatives must exercise their discretion finally and definitely, and not shift the responsibility placed upon them. *Barto* v. *Himrod* (1853) 8 N. Y. 483; *Locke's Appeal* (1873) 72 Pa. 491; *State* v. *Parker* (1854) 26 Vt. 357. Though of general application, the rule is not absolute and should be read in the light of the theory that the representatives are presumed to be better fitted to judge of the expediency of laws than are the people themselves. *Thorne* v. *Cramer* (1851) 15 Barb. 112. The spirit of the rule, therefore, does not include legislation which in the extent of its application is extremely limited. In such cases the legislature cannot in fact or theory be said to act more advantageously. *People* v. *Caldwell* (1848) 10 Ill. 1; *Upham* v. *County Sup'rs* (1857) 8 Cal. 378. There is no question that it may delegate certain powers ordinarily incident to municipalities; powers of local government, especially local taxation and police regulations. *State* v. *Noyes* (1855) 30 N. H. 279; *Commonwealth* v. *Bennett* (1871) 108 Mass. 27; Cooley, Const. Lim. 264. In the cases involving these municipal ordinances, the analysis often employed is that the constitutions were made with the idea of local government in mind, and with the specific intention that local legislative power should be delegated. *People* v. *Hurlbut* (1871) 24 Mich. 44. Yet by the weight of authority the legislature may deprive the people of the usual powers of local government not expressly reserved to them by the constitution. *In re Senate Bill* (1888) 12 Colo. 188; *People* v. *Pinckney* (1865) 32 N. Y. 377; *Meriwether* v. *Garrett* (1880) 102 U. S. 472. Moreover, powers not ordinarily incident, at least originally, to municipal corporations, may be delegated to them. *Stein* v. *Mayor* (1854) 24 Ala. 591; *Clarke* v. *Rochester* (1857) 24 Barb. 446; *St. Louis* v. *Alexander* (1856) 23 Mo. 483; *Thompson* v. *Lee County* (1865) 3 Wall. 327. It is evident, therefore, that the extent to which delegation is proper need be tested only with reference to the general purposes of legislative authority. So viewed, the delegation of legislative power in matters of purely local concern, though it must not be unreasonably construed to include the giving of a right to make any local law whatever, *People* v. *Collins* (1854) 3 Mich. 415, is perfectly proper in the ordinary case. It is unnecessary, therefore, in connection with purely local acts, to inquire whether a submission to popular vote is a delegation.

In the case of a general law, however, the question becomes one of importance, since any delegation of power in matters not local is forbidden by the spirit of the constitutions. *People* v. *Reynolds* (1848) 10 Ill. 1. Contingent or conditional legislation is generally valid. The act is a